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SREESANTHAN ELIATHAMBY v. SURUHANJAYA SEKURITI MALAYSIA

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
M GUNALAN JCA
B HASHIM HAMZAH JCA
[CIVIL APPEAL NO: W-01(NCC)(W)-599-11-2020]
29 JUNE 2024

C **Abstract** – *(i) While both civil and criminal proceedings may arise from insider trading under the Securities Industry Act 1983, they serve distinct purposes and have different consequences. Civil actions aim to deter insider trading and restore market integrity, while criminal proceedings focus on punishing the offender. The Securities Commission has the authority to initiate civil proceedings arising from insider trading without the Attorney General's consent; (ii) The requirement of 'improper use' of insider information has been relaxed. The mere possession and trading on insider information is sufficient to constitute a violation.*

D

E ***SECURITIES:*** *Shares – Insider trading – Lawyer appointed by bank with respect to corporate exercise of privatisation of listed company – Lawyer bought two tranches of shares in listed company – Shares disposed of after public announcement when queried by officials – High Court ordered lawyer to pay three times gains made on disposal of impugned shares plus penalty of RM1 million and disqualification from being director of public-listed company for ten years – Whether consent of* F *Attorney General necessary before commencement of civil proceeding arising from insider trading – Whether lawyer in possession of information not generally available when shares acquired – Whether not generally-available information price-sensitive – Whether on becoming generally available, reasonable person would expect it to have material effect on price of shares – Whether 'improper use' proven –* G *Securities Industry Act 1983*

The appellant, a lawyer with considerable repute and stature in corporate restructuring, was appointed by CIMB Investment Bank ('CIMB') with respect to a corporate exercise of privatisation of a listed company that was a subsidiary of a State corporation. In the run up to his formal appointment H and the public announcement ('announcement') to be made to Bursa Malaysia, the appellant bought two tranches of shares of 200,000 and 400,000 shares in the listed company. The appellant quickly disposed of the impugned shares after the announcement when CIMB officials queried him on his acquisition of the shares. In the High Court, the respondent, the I Securities Commission Malaysia ('SC'), claimed against the appellant for insider trading. The appellant argued that: (i) the proceedings against him was

null and void for want of the Attorney General's ('AG') consent which was necessary for both a criminal prosecution as well as a civil action for recovery of damages, premised on a criminal offence; and (ii) there was a need to prove 'improper use' of the information that was said to be not generally available price-sensitive information ('insider information') and without that, there was no *mens rea* for the offence. The High Court rejected the appellant's arguments. Having found that the SC had proved its claim for insider trading on a balance of probabilities, the High Court ordered the appellant to pay three times the gains he made on the disposal of the impugned shares, amounting to RM1,989,402 plus a penalty of RM1 million and a disqualification from being a director of the public-listed company for ten years. The appellant was also ordered to pay costs of RM100,000 to the SC. Hence, the present appeal by the appellant. The main grounds of appeal were, *inter alia*, that: (i) the consent of the AG was necessary for the civil suit and absent that, the whole proceedings was unconstitutional, null and void; (ii) the SC had not proved that the information with respect to PKNS privatising its listed subsidiary Worldwide Holdings Bhd ('Worldwide') was information not generally available when it had become market news; (iii) the SC had not proved that such information, which included the price at which the shares would be offered if generally available, would be price-sensitive information as regards the price of shares in Worldwide; and (iv) the SC had not proved that the appellant had put the impugned information to 'improper use', a necessary ingredient of the offence, by the purchase of the impugned shares as the appellant had purchased the impugned shares in Worldwide based on a CIMB Research Report given to him by his remisier where it was obvious that Worldwide would be declaring dividends soon and that the company's shares were undervalued.

Held (dismissing appeal)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) While both criminal and civil proceedings are predicated on an offence of insider trading in violation of the same Act, the Securities Industry Act 1983 ('SIA') (repealed by the Capital Markets and Services Act 2007) and that both are initiated in the public interest, both do not result in penal consequences. The criminal proceedings would, upon concluding with a conviction, see the insider trader being visited with a penal sentence but a civil action would at best result in a civil penalty for which there is no criminal sanction or punishment but a civil debt recoverable like any civil debt. Moreover, there is no record of a conviction in a civil action. The attempt to blur the distinction between a criminal proceeding for the offence of insider trading and a civil action predicated on insider trading by drawing an analogy with a criminal and civil contempt action was not quite appropriate as civil contempt is generally understood to be *quasi*-criminal as the court, upon a finding of

contempt, may impose a custodial sentence to purge the contempt. Article 126 of the Federal Court ('FC') uses the language of 'punishment' when conferring jurisdiction on the superior courts to punish for contempt of court. There would be a serious misnomer and mismatch of language to interpret 'any proceedings for an offence' under art. 145(3) of the FC to cover a civil proceeding to recover an amount or civil penalty or both when the ordinary use of the words in the expression do not support it and indeed one would be straining and stretching the language used beyond its scope. After all, it is only the 'prosecution for any offence under this Act' in s. 126(1) of the SIA under the heading of 'Conduct of prosecution' that requires the written consent of the Public Prosecutor. Here, it was the SC as the regulator tasked with the duty of ensuring and enhancing market transparency and integrity and enforcing the law, that was reposed with the discretion as to whether or not to pursue a civil remedy and if the AG so required the SC to get his clearance and written consent before proceeding with a civil remedy, it would have been expressly provided for. Thus, the civil action commenced by the SC, tasked with ensuring market integrity and to deter insider trading, was perfectly in order and not null and void. There was nothing unconstitutional about the civil action and remedy taken nor was it a case of a lack of jurisdiction that would justify a striking out of the civil claim. (paras 13, 33-35, 38 & 42)

(2) Both the key officials of CIMB, Mr Tan and Mr Ong, testified that they were positive in informing the appellant about the entity that was undertaking the corporate exercise of privatisation of its listed vehicle as early as the first meeting with the appellant. The proposed privatisation would invariably require legal expertise both in structuring it and executing it with respect to drafting of the necessary agreements, the resolutions to be passed, the parties who should abstain from voting and those who could vote, the approval of the court, if necessary, and the possible obstacles that may be encountered and the ways to overcome them, always in compliance with the law. The legal expertise sought was from Messrs Kadir Andri & Partners ('KAAP') and the appellant was the corporate advisory face and head of KAAP, with formidable experience and finesse in corporate restructuring work. A bevy of lawyers from KAAP was engaged in this corporate exercise. The evidence of the appellant's associate, who worked exclusively for him, further revealed that she had received the insider information from the appellant himself. The appellant knew, as a matter of fact, that this insider information was not generally available as it was information disclosed on a strict confidential basis which a legal professional, like himself, would be duty-bound to guard and safeguard. During this prohibited period, the appellant had acquired the two tranches of shares in Worldwide. (paras 55-57, 64 & 83)

(3) Generally, the offer price must bear a premium compared to the price at which the shares in the target company are accustomed to be traded so as to incentivise shareholders to realise the returns in their investments in the target company. The knowledge of the actual price need not be had and whilst an indicative price range was being addressed, that decision to fix the price is often made shortly before the public announcement of the corporate exercise of privatisation, regard being had to the average price of the shares that were being traded during the period in question. The fact of the corporate exercise of privatisation is far more important as the insider information that is not generally available compared to the actual price that is being fixed for the purchase a few days before the public announcement. The rationale is that the offer to purchase the shares in the company to be privatised, *ie*, Worldwide must be attractive enough for investors who want to cash out as, once the target company is privatised, the shares would no longer be that liquid and minority shareholders would have little effective say in the management of the company with no independent directors to look out for their interests and to protect them from decisions of the majority which may not be in the interest of the company as a whole. There is no requirement of the element of subjective knowledge of the price-sensitive nature of the information as all that is needed to be proved by the SC under s. 89E(1)(b) of the SIA is that upon the information becoming generally available, a 'reasonable person would expect it to have a material effect on the price or the value of securities.' The appellant was not a novice in the area of such corporate exercises. His vast experience was often sought in respect to structuring corporate deals where skill and strategy may well make a whole world of difference. It was a case of the appellant being an insider, in that, he was in possession of not generally available price-sensitive insider information and that during the period of coming into possession of such information and before the public announcement, the appellant acquired shares in the company Worldwide to which the information related. The High Court had not erred nor misappreciated the evidence in concluding that the not generally-available information was such that a reasonable person would expect it to have a material effect on the price or the value of securities of Worldwide. (paras 87-89 & 110-111)

(4) Proving 'improper use' of such information is no longer necessary as anyone caught for and charged with insider trading would invariably say that they traded based on what sources of information lawfully made available to them as in some analysts' or research reports that were given to them or that they had access to as a client of some investment banks in which they had a share trading account or even on their own analysis of listed companies' annual report and quarterly reports. Further, in the field of 'knowledge', it was impossible to 'drill into' and 'detect' as it

was the element of the knowledge that was used when trading in securities during the material prohibited period as no one knows what goes on in the mind of a person purchasing or disposing of shares in a listed company. Thus, 'improper use' has to be by reference to deduction, inference and conclusion from the circumstantial evidence in each particular case. Parliament may use the device of 'presumptions' and 'deeming' with respect to proving 'improper use' or amend the law on the ingredients of insider trading to focus on what is prohibited which is the prohibition of dealing in securities by an insider who knows or ought reasonably to know of generally not available price-sensitive information during the relevant period. (paras 130, 133 & 134)

(5) Much trust is reposed on professionals like lawyers engaged in many a corporate exercise. It does not matter if walls have ears but those in the know are held to a higher standard and trust, once broken, is difficult to be restored. The disgorgement of an amount equal to three times the gains made is provided for under s. 90A(5)(a) of the SIA and it kicks in upon a finding that a contravention of s. 89E(2) had taken place. The award of the maximum civil penalty of RM1 million was not misplaced but, on the contrary much, needed to send a clear message that indulging in the prohibited conduct was painful. After all, a professional like the appellant stood in a fiduciary relationship with his client, redolent of the trust and confidence reposed in him. There was also no good reason to interfere with the order of the High Court barring the appellant from becoming a director of any public-listed company for a period of ten years, pursuant to s. 100(1)(kk) of the SIA. (paras 153, 154 & 157)

Case(s) referred to:

Australian Securities And Investments Commission v. Westpac Banking Corporation [2018] FCA 751 ***(refd)***

Goh Keat Peng v. PP [2001] 2 CLJ 498 HC ***(refd)***

Jorgensen v. Beach 'N' Bay Realty, Inc [1981] 125 Cal App 3d 155 ***(refd)***

Lew Chee Fai Kevin v. Monetary Authority of Singapore [2012] SGCA 12 ***(refd)***

Mansfield v. The Queen; Kizon v. The Queen [2012] HCA 49 ***(refd)***

PP v. Ng Chee Kheong [1999] SGHC 204 ***(refd)***

R v. Farris [2015] WASC 251 ***(refd)***

R v. Rivkin [2003] NSWSC 447 ***(refd)***

United States v. Teicher 987 F2d 112 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 69D, 69E, 69F, 69G, 69H, 69I, 176

Companies Act 2016, ss. 136, 137, 138, 139, 140, 141

Criminal Procedure Code, s. 376(1), (3)

Federal Constitution, arts. 126, 145(3), 183

Government Proceedings Act 1956, ss. 8, 9(1), (2)

International Organizations (Privileges and Immunities) Act 1992, s. 9

Mutual Assistance in Criminal Matters Act 2002, s. 20
Securities Industry Act 1983 (repealed), ss. 89A, 89B, 89C, 89D, 89E(1)(a), (b), (2)(a), (b), (4), 89F, 89G, 89H, 89I, 89J, 89K, 89L, 89M, 89N, 89O, 90(1), 90A(5)(a), (6), 100(1)(kk), 126(1)

Constitution of the Republic of Singapore [Sing], art. 35(8)
Corporations Act [Aus], s. 1002G(1)
Securities and Futures Act 2001 [Sing] ss. 220, 232(1)

For the appellant - Gurdial Singh Nijar, Gopal Sreenevasan, Mark Lau, Talitha Shim & Ibrahim Au; M/s Sreenevasan Young
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[Editor's note: For the High Court judgment, please see Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby [2021] 7 CLJ 913 (affirmed).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] The appellant, a lawyer with considerable repute and stature in corporate restructuring, was appointed by CIMB Investment Bank ("CIMB") with respect to a corporate exercise of privatisation of a listed company that was a subsidiary of a State corporation. In the run-up to his formal appointment and the public announcement ("announcement") to be made to Bursa Malaysia ("Bursa"), the Stock Exchange of Malaysia, the appellant bought two tranches of shares of 200,000 and 400,000 shares in the listed company. The appellant quickly disposed of the impugned shares after the announcement when CIMB officials queried him on his acquisition of the shares. They stumbled upon his shareholding when going through the list of shareholders of the listed company.

[2] The brunt of the complaint of the Securities Commission ("SC") was that the appellant had committed the offence of prohibited conduct of person in possession of inside information loosely referred to as insider trading for which the SC could charge him for the offence or pursue a civil action or both.

[3] In this appeal, we are focused on the civil action for recovery of three times of the gains he had made on top of civil penalties of a fine not exceeding RM1 million. The High Court also ordered, upon liability being established, a prohibition against him from being a director of a public-listed company for a period of ten years. The discretion to commence a civil action may be exercised by the SC under s. 90A(6) of the Securities Industry Act 1983 [Act 280] ("SIA") (repealed by the Capital Markets and Services Act 2007 [Act 671]) if it is in the public interest so to do.

[4] Briefly, the offence of insider trading involves the element of one being an insider possessed of generally not available price-sensitive insider information and when so possessed, one does that which is prohibited, the acquisition or disposal of shares in the listed company to be privatised in this case.

[5] The SC, as the plaintiff in the civil action in the High Court, would have to prove that an offence of insider trading had been committed by the defendant as in the contravention of s. 89E(2) of the SIA on a balance of probabilities.

In The High Court

[6] The appellant argued that the proceeding against him is null and void for want of the Attorney General's ("AG's") consent, which consent is necessary for both a criminal prosecution as well as a civil action for recovery of damages premised on a criminal offence. The argument was that the core and substance of the claim is still very much buttressed upon a proof of a criminal offence of insider trading and it is only the remedies that differ.

[7] The High Court rejected that argument and it took the position that a civil suit to recover damages cannot be equated to a criminal prosecution for which the AG's consent would be necessary. The difference in the remedies in that no fines nor a custodial sentence may be imposed makes a world of difference and if Parliament had wanted that the prior consent of the AG should first be had before any civil action may be commenced, it could easily have made provision for it as had been done in other jurisdictions like Singapore, India and the European Union.

[8] It was also argued that there is a need to prove "improper use" of the information that is said to be not generally available price-sensitive information ("insider information") and without that, there is no *mens rea* for the offence. The High Court rejected this argument based on the clear words of the relevant provision in s. 89E(1) and (2) of the SIA do not refer to the "improper use" of the insider information.

[9] The High Court held that the *mens rea* consists of "being in possession" of the insider information. The High Court held that the test of "being in possession" of the insider information is an objective one both where the requirements that it is "not generally available" and its "price-sensitive" character are concerned as underscored by the words in s. 89E(1)(b) "knows or ought reasonably to know that the information is not generally available" and in s. 89E(1)(a) wherein a "reasonable person would expect it to have a material effect on the price or the value of securities."

[10] The High Court made the deduction from the evidence adduced that the appellant was aware that the insider information was not generally available price-sensitive information and being in possession of the insider information, he performed a prohibited act in that he acquired the impugned shares.

[11] Having found that the SC, as the plaintiff, had proved its claim for insider trading on a balance of probabilities, the High Court granted the reliefs the SC prayed for in ordering the defendant to pay three times the gain he made on the disposal of the impugned shares amounting to RM1,989,402 plus a penalty of RM1 million and a disqualification from being a director of the public-listed company for ten years. Interest at the rate of 5% per annum on the judgment sum was also ordered from 5 November 2020 to full realisation. Cost of RM100,000 was also ordered to be paid by the defendant to SC as the plaintiff in the High Court.

[12] The defendant, as appellant before us, had appealed against the whole of the decision of the High Court. The plaintiff and the defendant in the High Court below shall be referred to as the SC and the appellant, respectively, in this judgment.

[13] The SIA had been repealed by the Capital Markets and Services Act 2007 ("CMSA"), which came into force on 28 September 2007. Similar provisions on insider trading and civil action to recover damages are also found in Subdivision 2 of Part V of the CMSA.

Before The Court Of Appeal

[14] The main grounds of appeal are *inter alia*, as follows:

(i) that the consent of the AG is necessary for the civil suit and absent that the whole proceedings is unconstitutional, null and void;

(ii) that the SC had not proved that the information with respect to PKNS privatising its listed subsidiary Worldwide Holdings Bhd ("Worldwide") was information not generally available when it had become market news;

(iii) that the SC had not proved that such information, which included the price at which the shares would be offered if generally available, would be price-sensitive information as regards the price of shares in Worldwide;

(iv) that the SC had not proved that the appellant had put the impugned information to "improper use", a necessary ingredient of the offence, by the purchase of the impugned shares as the appellant had purchased the impugned shares in Worldwide based on a CIMB Research Report given to him by his remisier, where it was obvious that Worldwide would be declaring a dividend soon and that the company's shares were undervalued.

A **Whether The Consent Of The AG Is Necessary Before The Commencement Of The Civil Action**

[15] Generally, a civil action or suit that does not involve the Federal Government would not require the consent of the AG before it is filed. Where Parliament deems it important enough for the prior consent of the AG to be obtained first before a civil action is commenced, a specific provision is enacted in the relevant statute to provide for it, such as in the case of an action involving public nuisance or a public charitable trust.

[16] Thus s. 8 of the Government Proceedings Act 1956 provides as follows:

> **Public nuisances**
>
> 8(1) In the case of a public nuisance the Attorney General, or two or more persons **having obtained the consent in writing of the Attorney General**, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be be appropriate to the circumstances of the case.
>
> (emphasis added)

[17] Under s. 9 of the Government Proceedings Act 1956, with respect to a civil action for breach of a public charitable trust, it is provided in s. 9(1) and (2) as follows:

> **Public, religious, social or charitable trusts**
>
> 9. (1) In the case of any *alleged breach of any express* or constructive *trust for public, religious*, social or *charitable purposes*, or where the direction of the court is deemed necessary for the administration of any such trust, *the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of*:
>
> (a) asserting any interest or right in the trust property;
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> (b) removing any trustee;
>
> (c) appointing a new trustee;
>
> (d) vesting any property in a trustee;
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> (e) directing accounts and inquiries;
>
> (f) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
>
> (g) authorising the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged;
>
> (h) settling a scheme; and
>
> (i) obtaining such further or other relief as the nature of the case may require.

(2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.

(emphasis added)

[18] Article 183 of the Federal Constitution is another express reference to the consent of the AG as follows:

No action to be instituted against the Yang di-Pertuan Agong or a Ruler except with the consent of the Attorney General personally

No action, civil or criminal, shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in respect of anything done or omitted to be done by him in his personal capacity **except with the consent of the Attorney General personally**.

(emphasis added)

[19] The provisions of other statutes that expressly refer to the consent of the AG are s. 20 of the Mutual Assistance in Criminal Matters Act 2002 and s. 9 of the International Organizations (Privileges and Immunities) Act 1992.

[20] Where there is no prohibition in commencing a civil action without the consent of the AG, one cannot imply or impute the need for a prior consent with the effect that the whole proceeding becomes null and void. This is more so when Parliament had on other occasions for a civil action expressly provided for the consent of the AG to be obtained first before a civil action is commenced. What is not prohibited is permitted lest, by way of judge-made law or pronouncement, a prohibition is imposed because a court of law says so.

[21] The fact that the same ingredients of an offence have to be proved in the civil action, though now on a balance of probabilities, does not equate to requiring the consent of the AG as is required in a criminal prosecution. A criminal offence is an offence against the State, though there may be a person or persons who are victims. The decision to proceed with prosecution is vested with the AG under art. 145(3) of the Federal Constitution ("FC") as follows:

The Attorney General shall have power, exercisable at his discretion, to institute, conduct, or discontinue any proceedings for an offence, other proceedings before a Syariah court, a native court or a court-martial.

[22] Under s. 376(1) of the Criminal Procedure Code ("CPC"), the Public Prosecutor is the Attorney General. Generally, a prosecution conducted by a Deputy Public Prosecutor ("DPP") would be deemed sufficient compliance with art. 145(3) of the FC and in a case where a written consent of the Public Prosecutor is required for the prosecution of an offence then normally the written consent is tendered at the trial and marked as an exhibit. Thus, it was held in *Goh Keat Peng v. PP* [2001] 2 CLJ 498 that where there is a specific provision in relation to the requirement of obtaining a prior

consent in writing of the Public Prosecutor to prosecute in a statute then there is no room for the general doctrine of "alter ego" of the DPP under s. 376(3) of the CPC to apply.

[23] For the prosecution of an offence under the SIA, it is specifically provided that the consent in writing of the Public Prosecutor is required in s. 126 of the SIA as follows:

> (1) No prosecution for any offence under this Act shall be instituted except with the **consent in writing** of the Public Prosecutor;
>
> (2) Any officer authorised in writing by the Public Prosecutor, may prosecute any case in respect of any offence committed under this Act. (emphasis added)

[24] Learned counsel for the appellant submitted that the expression "any proceedings for an offence" under art. 145(3) of the FC must be interpreted broadly, consistent with the gravity of an offence, to cover all proceedings taken in respect of an offence, be it criminal, civil or even regulatory such that the mode of proceedings is not the determinant factor so long as the nature of the prohibition and the consequences of the contravention exhibit the characteristic of an offence.

[25] Be that as it may, there is a material difference between a criminal offence and a civil wrong. A successful prosecution would result in a conviction being recorded depending on the length of imprisonment, and the language used is "shall be punished" if the term of imprisonment is mandatory upon a finding of guilt and conviction or "shall be liable" or "is liable" where the term of imprisonment is discretionary. A conviction and the imposition of a sentence may disqualify one from being a member of Parliament or if one is a civil servant, one may be dismissed. Any fines imposed go to the Federal Consolidated Fund and the victim does not get any compensation. A default of payment of fine in a criminal prosecution, which may be imposed upon a conviction, is followed by a further term of imprisonment.

[26] In a civil action, the language used is that of "to recover an amount" or "civil penalty" and not the language of "shall be punished". There is no conviction that is recorded no matter how huge the amount recovered or the civil penalty imposed may be and any recovery of that amount and the civil penalty imposed is by way of the normal modes of execution under the Rules of Court 2012 or a bankruptcy action in the case of an individual. Thus, the language in a civil claim is not the language of punishment as in "shall be punished" but rather the expressions of "to recover an amount" or to "claim civil penalty in such amount" is used. It is not the language of a criminal incarceration but the language of a civil indemnity. There is no extended imprisonment sentence imposed for default in payment of the amount

ordered or the civil penalty but rather a civil execution process may be pursued. In fact, no matter how grave the civil penalty, there is no punishment of an imprisonment or fine or both.

[27] Thus, the definition of an "offence" under the Criminal Procedure Code is as follows:

> ... means any act or omission made **punishable** by any law for the time being in force.
>
> (emphasis added)

[28] Section 89E(2) of the SIA sets out the prohibited conduct by an insider:

> an insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates:
>
> (a) **acquire or dispose of**, or enter into an agreement for or with a view as to the acquisition or disposal of **such securities**; or
>
> (b) **procure, directly or indirectly, an acquisition or disposal of**, or the entering into an agreement for or with a view to the acquisition or disposal of **such securities**.
>
> (emphasis added)

[29] Section 89E(4) of the SIA goes on to provide that:

> A person who contravenes or fails to comply with subsection (2) or (3) commits an offence and **is liable on conviction to a fine of not less than one million ringgit** and to **imprisonment for a term not exceeding ten years**.
>
> (emphasis added)

[30] Division 3, Part IX sets out the civil liability regime under the SIA. It is titled as "Liability For Unlawful Activity" and s. 90 is titled as "Civil remedies" and it reads:

> 90. **Civil remedies**
>
> (1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, *the Commission may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.*
>
> (2) A proceeding under subsection (1) or under section 88A or 90A may be begun at any time within 12 years from:
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date on which the Commission or the plaintiff, as the case may be, discovered the contravention,
>
> whichever is the later.
>
> (emphasis added)

[31] Section 90A(5) of the SIA housed under "90A. Recovery of loss or damages" provides as follows:

> (5) Where an insider acquired or agreed to acquire, or procured another person to acquire or agree to acquire, securities, **in contravention of subsection 89E(2)**, and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not the insider or any other person involved in the contravention has been charged with an offence in respect of the contravention or whether or not the contravention has been proved in a prosecution, **the Commission may, if it considers that it is in the public interest to do so, by civil action against the insider** or any other person involved in the contravention:
>
> (a) **recover an amount equal to three times the amount** being the difference between the price at which the securities were acquired, or agreed to be acquired, by the insider or other person, and the price at which they would have likely to have been acquired at the time of the acquisition or agreement as the case may be, if the information had been generally available; and
>
> (b) *claim civil penalty* in such amount as the Court considers appropriate having regard to the seriousness of the contravention, **being an amount not more than one million ringgit**.
>
> (emphasis added)

[32] With the greatest of respect to learned counsel for the appellant, we are unable to agree that in reading the above sections together, the clear conclusion is that any civil action instituted under s. 90A(5) of the SIA is in respect of a contravention of the prohibition in s. 89E(2) of the SIA and as such any proceedings instituted pursuant to a criminal action under s. 89E(2) read with s. 89E(4) of the SIA and proceedings instituted pursuant to a civil action under s. 90A(5) of the SIA are both "proceedings for an offence", falling within the scope of any "any proceedings for an offence" for the purposes of art. 145(3) of the FC.

[33] While both criminal and civil proceedings are predicated on an offence of insider trading in violation of the same Act, the SIA, and that both are initiated in the public interest, we do not agree that both result in penal consequences. The criminal proceedings would upon concluding with a conviction see the insider trader being visited with a penal sentence but a civil action would at best result in a civil penalty for which there is no criminal sanction or punishment but a civil debt recoverable like any civil debt. Moreover, there is no record of a conviction in a civil action.

[34] The attempt to blur the distinction between a criminal proceeding for the offence of insider trading and a civil action predicated on insider trading by drawing an analogy with a criminal and civil contempt action is not quite appropriate as civil contempt is generally understood to be *quasi*-criminal as the court upon a finding of contempt may impose a custodial sentence to

purge the contempt. Article 126 of the FC uses the language of "punishment" when conferring jurisdiction on the superior courts to punish for contempt of court as follows:

> The Federal Court, the Court of Appeal or a High Court shall have **power to punish** any contempt of itself.
>
> (emphasis added)

[35] There would be a serious misnomer and mismatch of language to interpret "any proceedings for an offence" under art. 145(3) of the FC to cover a civil proceeding to recover an amount or civil penalty or both when the ordinary use of the words in the expression do not support it and indeed one would be straining and stretching the language used beyond its scope. After all, it is only the "prosecution for any offence under this Act" in s. 126(1) of the SIA under the heading of "conduct of prosecution" that requires the written consent of the Public Prosecutor.

[36] With respect to learned counsel for the appellant, we do not agree that the same stigma attaches to the accused or defendant in either proceeding when in a civil proceeding there is no record of a conviction, no term of imprisonment and no imprisonment for default in fine no matter how colossal the amount or substantial the civil penalty that is sought to be recovered.

[37] Generally, a victim of a crime may sue the offender whether the offender is successfully prosecuted or not and the civil action is to recover damages from the offender and may even extend to an injunction to restrain the offender from coming near the victim or communicating with the victim. Thus, in a rape case, the victim may sue the offender for damages for sexual assault and battery, false imprisonment and causing emotional harm and trauma to the victim and the necessary injunction. Whilst the same ingredient of rape would have to be proved on a balance of probabilities, the proceedings in a civil court is not a proceeding for an offence but a civil proceeding for damages which can be commenced without the prior consent of the AG and there is no term of imprisonment that the civil court can impose upon a finding of liability but generally only damages payable to the victim who sues as the plaintiff against the defendant offender.

[38] Here, it is the SC as the regulator tasked with the duty of ensuring and enhancing market transparency and integrity and enforcing the law that is reposed with the discretion as to whether or not to pursue a civil remedy and if the AG so requires the SC to get his clearance and written consent before proceeding with a civil remedy, it would have been expressly provided for.

[39] Article 35(8) of the Constitution of the Republic of Singapore is very similar to art. 145(3) of our FC and it provides that "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." Singapore had to include in its

Securities and Futures Act (Chapter 289) ("SFA") an express provision for the prior consent of the Public Prosecutor before a civil penalty action may be commenced. Thus s. 232(1) of the SFA provides as follows:

> (1) Whenever it appears to the Authority that any person has contravened any provision in this Part, the Authority may, with the consent of the Public Prosecutor, bring an action in court against him to seek an order for a civil penalty in respect of that contravention.

[40] That need to expressly provide for the prior consent of the Public Prosecutor in a civil penalty action would reinforce the argument that without the amendment, it is difficult to argue for a need of the written consent of the Public Prosecutor for the commencement of a civil action to recover damages. It lends credence to the argument that whether or not the Public Prosecutor's consent is necessary for a civil claim against an offender is very much a policy matter which may be legislated. In the absence of legislation, the court would be slow to legislate on behalf of the AG, for under our Constitution, the doctrine of separation of powers is recognised.

[41] There is no need to interpret our laws according to how other countries have interpreted theirs as our law here is worded differently from that of other jurisdictions for a similar civil claim or remedy arising from an offence. Thus, where no prohibition is stated, the courts should not impose one lest it be said that the Judiciary has encroached into the Legislature's domain.

[42] Thus, the civil action commenced by the SC tasked with ensuring market integrity and to deter insider trading was perfectly in order and not null and void. There is nothing unconstitutional about the civil action and remedy taken nor is it a case of a lack of jurisdiction that would justify a striking out of the civil claim.

Whether The Appellant Was In Possession Of Information Not Generally Available With Respect To PKNS Privatising Its Listed Subsidiary Worldwide Holdings Bhd ("Worldwide") When He Acquired The Two Tranches Of Shares

[43] The material dates for the acquisition of the impugned shares by the appellant were between 7 June 2006 and 13 June 2006, for the first tranche of a total of 200,000 Worldwide shares between the price range of RM1.95 and RM 1.9558. The second tranche of acquisition by the appellant of 400,000 shares of Worldwide was between 29 June 2006 and 11 July 2006 between the price range of RM2.1242 and RM2.2415.

[44] The offence of "insider trading" is defined with reference to who is an "insider" and the prohibited act of the insider in s. 89E(1) and (2) of the SIA. An "insider" is one who meets the requirements of s. 89E(1)(a) and (b) of the SIA, which read as follows:

89E Prohibited conduct of person in possession of inside information

(1) A person is an "insider" if that person:

(a) **possesses information** that is not generally available which on becoming generally available **a reasonable person would expect it to have a material effect on the price** or the value of securities; and

(b) **knows or ought reasonably to know that the information is not generally available**.

(emphasis added)

[45] Thus, an "insider" would be a person who possesses information which he knows or ought reasonably to know that the information is not generally available, which, on becoming generally available, a reasonable person would expect it to have a material effect on the price or the value of securities to which the information relates ("the price-sensitive insider information").

[46] The prohibited act of an "insider" is against him acquiring or disposing of such securities or procuring that others do it as set out in s. 89E(2)(a) or (b) as follows:

(2) **An insider shall not**, whether as principal or agent, in respect of any securities to which information in subsection (1) relates:

(a) **acquire or dispose of**, or enter into any agreement for or with a view to the acquisition or disposal of **such securities**: or

(b) procure, directly or indirectly, **an acquisition or disposal of**, or the entering into an agreement for or with a view to the acquisition or disposal **of such securities**.

(emphasis added)

[47] The prohibited act committed becomes a criminal offence under s. 89E(4) of the SIA, where the insider is liable on conviction to a fine of not less than RM1 million and to imprisonment for a term not exceeding ten years. Section 90A(5) of the SIA provides for the SC to bring a civil action for disgorgement of three times the gains made in dealings with the securities to which the prohibited insider information relates and the imposition of civil penalty not exceeding RM1 million.

[48] The price-sensitive insider information ceases to be one when there is an announcement made on Bursa by the listed company or some press releases of the company to the general public or some business news report in the media publication through the print or electronic media or the company's webpage. Thus, any dealings in the securities to which the price-sensitive insider information relates would only be relevant during the prohibited period from the receipt of the said information to the public announcement of the same through Bursa or such other means where the information would become generally available.

[49] The device of "knows or ought reasonably to know that the information is not generally available" is used as knowledge of the non-public nature may be proved by direct evidence or circumstantial evidence. Direct evidence may be, for example, communication in writing or orally only to persons and professionals involved in the corporate exercise such as the investment bankers, lawyers, directors, company secretary and the like who may have access to the insider information by virtue of their position in the company or their relation to the corporate exercise.

[50] However, precisely because of the price-sensitive nature of the insider information, generally no written record or mention of it in writing may be found of the securities to which the information relates and only those in the inner circle would know as preparatory work has to be done before the announcement is made. Knowledge may thus be proved from circumstantial evidence as in deductions, inferences and conclusions that may be drawn from the actions and conduct of the insider. Thus, such a knowledge is said to be one that the insider "ought reasonably to know" for one cannot look into the person's mind to "see if the knowledge is there" but rather one goes by what a reasonable person would act or do that would be consistent with having such a knowledge. Such a knowledge is sometimes referred to as constructive or imputed knowledge. It is an objective test.

[51] The nearer a person is to the source of the price-sensitive insider information, the easier it would be for the person to appreciate that such an information is not generally available and hence the need to keep it secret and only within the circle of those who need to know because they are involved directly in the corporate deal or exercise. Human nature being what it is, it may be a struggle for some to keep the price-sensitive insider information secret as there is money to be made by the use of such information to one's advantage and to the disadvantage of others. As it is the price-sensitive insider information that has not been made public yet through the usual channel of a Bursa announcement for a public-listed company, there is an uneven investment playing field where those with such information may abuse it to their advantage to make a quick gain or to avoid a quick loss.

[52] We may recall the cartoon series "SpongeBob SquarePants", where a secret that was conveyed secretly with the recipient promising to keep it a secret was being conveyed to yet another person under the same condition such that before long, we have an open secret!

[53] This dilemma of human nature is appreciated by Bursa for in its Listing Requirements ("BLR") in paragraph/r. 9.05, it is provided as follows:

> **9.05 Withholding of material information**
>
> A listed issuer may, in exceptional circumstances, temporarily refrain from publicly disclosing material information, provided that complete confidentiality is maintained. Where material information is withheld, *the*

listed issuer must refrain from delaying disclosure for an unreasonable period of time since it is unlikely that confidentiality can be maintained beyond a short period of time.

(2) The exceptional circumstances where disclosures can be withheld are limited and constitute an infrequent exception to the normal requirement of immediate public disclosure. *In cases of doubt, the presumption must always be in favour of disclosure.*

(3) The following are the exceptional circumstances where disclosure may be temporarily withheld:

(a) when immediate disclosure would prejudice the ability of the listed issuer to pursue its corporate objectives;

(b) when the facts are in a state of flux and a more appropriate moment for disclosure is imminent; or

(c) where the laws prohibit the disclosure of such information.

(emphasis added)

[54] It is also a human tendency that what one cannot do by oneself for fear of discovery, one may try to do by passing on the information or by tipping someone else or procuring a tipper to do the acquisition or disposal of the securities to which the prohibited insider information relates. Or one might even surmise that if the trade is relatively small, then no one might be alerted to it and as soon as the opportunity presents itself, to quickly dispose of the securities for a quick gain for one's pocket money.

[55] Both the key officials of CIMB Investment Bank Berhad ("CIMB"), Mr Tan Hong Kheng ("Mr Tan") as PW1 and Mr Ong Liang Heng ("Mr Ong") as PW2, testified that they were positive in informing the appellant about the entity that was undertaking the corporate exercise of privatisation of its listed vehicle as early as the first meeting with the appellant on 5 May 2006. Mr Tan was the Head of the Structured Investments Department of CIMB and Mr Ong the co-head of a team in the Investment Banking Department before becoming the Head of the Corporate Finance Department. The entity was a Selangor State Development Corporation *ie*, Perbadanan Kemajuan Negeri Selangor ("PKNS") incorporated under the Selangor State Development Corporation Enactment 1964 ("State Enactment") as body corporate and an agency of the State for the development of Selangor.

[56] The proposed privatisation would invariably require legal expertise both in structuring it and executing it with respect to drafting of the necessary agreements, the resolutions to be passed, the parties who should abstain from voting and those who could vote, the approval of the court if necessary and the possible obstacles that may be encountered and the ways to overcome them, always in compliance with the law. The legal expertise sought was

from Messrs Kadir Andri & Partners ("KAAP") and the appellant was the corporate advisory face and head of KAAP, with formidable experience and finesse in corporate restructuring work.

[57] A bevy of lawyers from KAAP was engaged in this corporate exercise and they were Mr Adrian Chair (PW4), a partner in the firm's Corporate Department; Mr Mak Lin Kum (PW5), a partner in the firm's Litigation Department and Miss Koh Poi San (PW8), an associate in the firm's Corporate Department and who reported to the appellant.

[58] Evidence was led that the proposed privatisation was conceptualised in March 2006 by Mr Ong and his team and after getting the clearance and approval of CIMB's Executive Committee, a first meeting was had on 5 May 2006 between Mr Tan and Mr Ong with the appellant, understandably to tap into the vast legal experience of the appellant to structure the deal. Both Mr Tan and Mr Ong were positive in recalling that at that 5 May meeting they had communicated to the appellant the identity of the entity being PKNS and that it wanted to privatise its listed subsidiary by way of a scheme of arrangement under s. 176 of the Companies Act 1965. It is public knowledge easily accessible from documents filed with Bursa and CCM that PKNS had only one listed subsidiary in Worldwide, a fact also noted by the learned judge at para. [82] of his grounds of judgment ("GOJ").

[59] On 7 June 2006, CIMB led by Mr Ong made a PowerPoint presentation of the proposed privatisation to the Menteri Besar of Selangor and the proposal was that the privatisation exercise would be *via* a scheme of arrangement under s. 176 of the Companies Act 1965. See the PowerPoint in CCB(1) Tab 28 at pp. 673 to 674. The Menteri Besar, who is the Chairman of PKNS, was receptive to the plan.

[60] Learned counsel for SC zeroed in on the key events as follows. On 8 June 2006, Mr Ong (PW2) made several phone calls to the appellant's personal mobile. Mr Tan (PW1) recalled participating in the telephone conversations between 6 June 2006 and 8 June 2006. Between 7 June 2006 and 13 June 2006, the appellant acquired a total of 200,000 Worldwide shares through his personal trading account (CDS Account No. 056-011-021977053) between the price range of RM1.95 and RM1.9558.

[61] It was further narrated in evidence that by 23 June 2006, KAAP was appointed and they commenced work on the proposed privatisation. The scope of engagement was for KAAP to act as the legal adviser, to draft the joint venture agreement and to prepare cause papers and attend court for the s. 176 scheme of arrangement.

[62] Learned counsel for SC also underscored the fact of a second tranche of acquisition by the appellant of 400,000 shares of Worldwide between 29 June 2006 and 11 July 2006 between the price range of RM2.1242 and RM2.2415.

[63] The appellant had tried to paint a picture of being completely clueless as to the identity of the entities involved and much less of the connection between PKNS and Worldwide by asserting that the 5 May meeting was conducted on a "no-name basis." He even asserted that he had no idea that Worldwide was a listed subsidiary of PKNS at that time.

[64] However, the appellant's actions do not support his stand. Miss Koh PW8, the appellant's associate who worked exclusively for him, was instructed by the appellant to study the State Enactment, after being briefed by the appellant on the matter. She emailed a summary of her research into the State Enactment on 15 June 2006. She recalled that the instruction must have come before 15 June 2006. The email was code-named "Project State" in its caption and she also saw the appellant's handwriting of "Worldwide Properties B" at the top right-hand corner of her printed email, indicating that the proposed privatisation was with respect to PKNS subsidiary Worldwide. The appellant had admitted that the handwriting was his. See CCB(2) Tab 52 at p. 601 para. 27 the EIC of the appellant.

[65] Miss Koh was positive that the instruction had not come from CIMB or one of her colleagues in KAAP. She was also positive that the code name had come from the appellant.

[66] It would be strange to suggest that it was just a serendipitous study that the appellant had instructed Miss Koh to embark upon if not for the fact that the entity was disclosed at the meeting. After all, there are just so many State body corporates incorporated under a State Enactment or Ordinance.

[67] Bearing in mind that the appellant was leaving for London at that time, it was reasonable to suppose that the State Enactment was a necessary reference point for the privatisation exercise. It does not require a mastery of rocket science to know that PKNS had only one public listed subsidiary at that time and putting the two and two together, it would be reasonable to conclude after the first meeting, and if not subsequent phone conversations, especially the ones immediately after the presentation of Tan and Ong to the Selangor Chief Minister, that both PKNS and Worldwide were within the knowledge of the appellant.

[68] Indeed, PKNS was the controlling shareholder of Worldwide with about 51% of Worldwide shares and the chairman of PKNS was the Menteri Besar or Chief Minister of Selangor. See the statement of agreed facts and the Bursa announcement dated 23 August 2006 as well as the PKNS' Annual Report 2006.

[69] The more the appellant sought to distance himself from the knowledge of any connection between PKNS and Worldwide or that it was unbeknown to him that Worldwide was a subsidiary of PKNS, the more damaging it became for the appellant. The appellant wanted the High Court to believe

that he had bought the two tranches of shares of Worldwide purely based on the CIMB April Research Report that he had earlier received from his remisier. The appellant said that he poured over much time studying the report, which he said formed the basis for his acquisition of Worldwide shares. The first page of the research report itself referred to Worldwide being 53% owned subsidiary of PKNS as follows:

> **A vehicle for the Selangor state**
>
> Worldwide is a 53%-owned subsidiary of PKNS, the Selangor State Economic Development Corporation, which comes under the purview of the Ministry of Finance ...

[70] See encl. 37 CCB(1) p. 1756, CCB(2) Tab 52 at pp. 604 to 605 – EIC of the appellant; Tab 38 at pp. 348 and 349.

[71] Seeing that the appellant had painted a picture of how meticulous he was when researching on what shares to acquire, it certainly does not jive with his not knowing that Worldwide was the only listed subsidiary of PKNS. Surely, amongst the questions one would ask before investing in a company would be who are the major or controlling shareholders in the company.

[72] Not only did the appellant try to distance himself from being in possession of the not generally available price-sensitive insider information, he also tried to defer the date of his having knowledge of PKNS and Worldwide and their involvement in the privatisation exercise and the steps to be taken en-route to the delisting of Worldwide. The appellant, in his defence, dragged the delay to "late July or early August" as his acquisition of Worldwide shares continued until 11 July 2006. However, the delay is equally damaging to the appellant.

[73] For an exercise of taking a listed entity private in which the State corporation has more than 50% of its listed shares to qualify as its subsidiary, an immediate question would be the likelihood of the resolution of the listed company being carried and the parties that would be disqualified from voting. Whether the route by *via* a s. 176 of the Companies Act 1965 exercise with approval of the High Court or a mandatory general offer or a selective capital reduction exercise; all would require the requisite shareholders' approval.

[74] A solicitor advising on the most efficient and effective route to take would have to know the entity that is being taken private to see which are the shareholders disqualified from voting and whether those eligible to vote would likely to vote in favour of the listed company being taken private in that they would be given an offer too good to reject. Mr Tan also explained in cross-examination that there were certain things that needed checking by

the appellant, such as whether a shareholder, which is a Selangor State entity like Kumpulan Perangsang Selangor ("KPS") in Worldwide can vote and that in order to do that, they needed to reveal some identities.

[75] There was also a need for disclosure of both PKNS and Worldwide to the appellant as the entities involved so that the solicitors of KAAP can do a conflict check to see if they are in any way conflicted out.

[76] The fact, that the appellant knew of the entity Worldwide being the target company for privatisation was further reinforced by the use of the code name "State Project" and the name of PKNS and Worldwide appearing in the first draft of the joint-venture agreement ("JVA") that were prepared and emailed to the appellant's secretary on 28 June 2006 as testified by Miss Koh. She stated as a matter of fact that the appellant had later instructed that the names of PKNS and Worldwide be removed from the revised second draft of the JVA emailed to the appellant on 30 June 2006 to maintain confidentiality. See CCB(1) Tab 14 at pp. 188 to 211 – email dated 30 June 2006 enclosing the revised second draft JVA.

[77] Miss Koh had also informed the appellant in her email of 6 July 2006 of the password to open the attachment as "Worldwide" not because the appellant was unaware of the target company being Worldwide but because the password was "case sensitive". That is a more consistent explanation compared to the appellant's assertion that he must have been completely clueless as to the identity of Worldwide even until then. See CCB(2) Tab 37 at pp. 251 to 252.

[78] There is further the email dated 6 July 2006 from Mr Ong to, among others, Miss Koh and copied to the appellant requesting for the draft resolution for PKNS' approval on the proposed privatisation where the target company Worldwide was also disclosed. See CCB(2) Tab 43 pp. 535 to 536.

[79] The learned High Court Judge had evaluated and appreciated the evidence of Mr Tan, Mr Ong and Miss Koh and these witnesses had been found to be credible. In particular, Miss Koh, being privy to what transpired between her and the appellant, had no good reason to lie and there was no suggestion that she had an axe to grind or a bone to pick with the appellant or that otherwise she had been mistaken in her testimony.

[80] The appellant called the journalist, Mr Joe Barrock, who wrote in the Business Star the article titled "Worldwide to be taken private?", which was published on 19 August 2006. It was on a possible plan to take Worldwide private and like most journalists, he does not reveal his source other than saying that he had reliably learned from those in the corporate restructuring circle that something is brewing. Reliance was sought to be placed on the evidence of the journalist that by the time the article was published, the information on a possible privatisation of Worldwide was already market news.

[81] The High Court was not impressed by such a bare averment with nothing to substantiate. The evidence adduced pointed to the contrary. Whilst a few in the inner circle involved in the privatisation exercise may know, others who had been provided with some information would not be acting on it until a formal source had confirmed it or that they had heard from the horses' mouth, so to speak. The share price of Worldwide did not move up significantly until on 25 August 2006 after the announcement was made and the suspension of trading on the shares of Worldwide was lifted. It surged to RM3.22 as compared to RM2.54 on 22 August 2006 when there was a suspension of trading.

[82] In other words, the market did not respond until the formal announcement was made and that demolished the argument that the insider information of the privatisation was already market news such that those in the know had already acted on it either by themselves or through their proxies. In the absence of evidence either from Bursa on the volume of shares traded before the suspension and subsequent announcement or from reliable market survey companies as to what the investing public had known even before the shares' suspension, the court cannot just rely on the opinion or hearsay evidence of a journalist that the insider information on the delisting or privatisation of Worldwide was already market news in that it was information generally available.

[83] We see no good reason to disturb the learned judge's finding that the information on the privatisation of Worldwide by PKNS was what the appellant knew from his direct involvement in the corporate exercise. It was the direct evidence of the information disclosed to him by Mr Tan and Mr Ong of CIMB, which information he needed to have and did have, to properly advise his client CIMB, who had a proprietary stake in the way the deal is structured and in preparing the various drafts of the JVA and documents relating to the scheme of arrangement. It was further corroborated by the evidence of Miss Koh that she had received the insider information from the appellant himself. The appellant knew as a matter of fact that this insider information was not generally available as it was information disclosed on a strict confidential basis which a legal professional like the appellant would be duty-bound to guard and safeguard.

[84] During this prohibited period, the appellant had acquired the two tranches of shares in Worldwide. It was more than a fair conclusion on the balance of probabilities that the learned judge found as follows:

> [91] In addition, there was direct evidence from the defendant's staff at Kadir Andri & Partners which established that:
>
> (i) as early as 15 June 2006, the defendant knew the identity of PKNS, which corroborated the testimonies of Mr Ong and Mr Tan; and

(ii) the defendant knew, at the very latest by 28 June 2006, that the target company was Worldwide Holdings Berhad.

[85] The learned judge, in the light of the overwhelming evidence, was justified in concluding at para. [129] of his GOJ as follows:

> ... (i) any reasonable person in the position of the defendant as a vastly experienced corporate lawyer ought to have known that information communicated to him in contemplation of a corporate proposal that had not yet been announced would be information that was not generally available. In the circumstances of this case, *I found it inconceivable that the defendant did not know that the information about the proposed privatisation was not generally available at the time that the trades in question were effected*. Indeed, in his own witness statement, he acknowledges that information that were the subject of discussions with investment bankers regarding corporate proposals would be "commercially sensitive" information ...
>
> (emphasis added)

[86] The question then is whether the information is also price-sensitive in that, on becoming generally available, a reasonable person would expect it to have a material effect on the price of shares in Worldwide.

Whether The Not Generally Available Information Is Price-sensitive In That, On Becoming Generally Available, A Reasonable Person Would Expect It To Have A Material Effect On The Price Of The Shares In Worldwide

[87] We accept the evidence of the SC's expert witness, Mr David Meow, that generally, the offer price must bear a premium compared to the price at which the shares in the target company are accustomed to be traded so as to incentivise shareholders to realise the returns in their investments in the target company. The knowledge of the actual price need not be had and whilst an indicative price range was being addressed, that decision to fix the price is often made shortly before the public announcement of the corporate exercise of privatisation, regard being had to the average price of the shares that were being traded during the period in question.

[88] The fact of the corporate exercise of privatisation is far more important as the insider information that is not generally available compared to the actual price that is being fixed for the purchase a few days before the public announcement. The rationale is that the offer to purchase the shares in the company to be privatised *ie*, Worldwide must be attractive enough for investors who want to cash out as once the target company is privatised, the shares would no longer be that liquid and minority shareholders would have little effective say in the management of the company with no independent directors to look out for their interests and to protect them from decisions of the majority which may not be in the interest of the company as a whole.

[89] There is no requirement of the element of subjective knowledge of the price-sensitive nature of the information as all that is needed to be proved by the SC under s. 89E(1)(b) of the SIA is that upon the information becoming generally available a "reasonable person would expect it to have a material effect on the price or the value of securities." The appellant is not a novice in the area of such corporate exercises and as noted by the learned High Court Judge, his vast experience is often sought in respect to structuring corporate deals where skill and strategy may well make a whole world of difference.

[90] On 22 August 2006, Worldwide requested Bursa to suspend the trading of its shares pending an announcement of a "proposal involving the securities of the company which would result in the company being taken private, which would warrant a material announcement." The last traded price for the day was RM2.54.

[91] On 23 August 2006, Worldwide made an announcement to Bursa on the proposed privatisation. In the announcement, an offer price of RM3.50 per share was made, which represented a premium. See: CCB(1), Tab 11 at p. 125 – Bursa announcement dated 22 August 2006 and CCB(1), Tab 12 at pp. 127 to 129 – Bursa announcement dated 23 August 2006.

[92] The offer of RM3.50 per share represented a premium of 53.5% to the last traded price of RM2.54 per share prior to the suspension and subsequent announcement. One does not have to look far and wide to confirm if the fact of the public announcement of the privatisation exercise had an effect on the share price of Worldwide shares for after trading resumed subsequent to the suspension of trading and the public announcement of the price of Worldwide shares surged to RM3.22.

[93] A suspension from trading at the request of the listed company is often to prevent speculation, especially after the Star business news report and it is generally in anticipation of a significant announcement on a matter that would be material as in affecting the share price of the company.

[94] There is thus no better evidence and proof of the price-sensitive nature of the information as indeed the official announcement made through Bursa had a "material effect on the price or the value of securities". As is often said, the proof is in the pudding!

[95] We recall what was stated in *Jorgensen v. Beach 'N' Bay Realty, Inc* [1981] 125 Cal App 3d 155 (Cal Ct App 1981) by the Court of Appeal of California, Fourth District, Division One that:

> The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: "You don't need a weatherman to know which way the wind blows."? The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is "resolvable by common knowledge".

[96] While Professor Talis Putnin may be an authority in the study on the factors such as the nature of the information and the circumstances of the impugned trading that would affect share price, we do not think we need to delve into the sophistication of shares spike and surges nor its sudden slide and deep dive lest we sink into the sophistry of trying the unravel the sometimes irrational behaviour of investors and punters. This is not to denigrate the scholarship of Professor Putnin in his years of studying the share market but rather that in this case, we prefer, as the learned judge did, a simpler approach to determining the materiality of the information in deciding if it is price-sensitive information.

[97] Our fears that Professor Putnin may have a tendency to elevate his theory to a doctrine and not to address the reality of the sharp movement of the share price staring at us in the face was not ours alone but also that of another court where Professor Putnin had given his expert opinion. Learned counsel for the SC drew our attention to a decision of the Federal Court of Australia in *Australian Securities And Investments Commission v. Westpac Banking Corporation* [2018] FCA 751, where the court had rejected Professor Putnin's evidence containing "theories, models or the application thereof" as follows:

> [1742] In summary, in my view there are significant difficulties with a wholesale adoption of Professor Putnins' theories. At a high level of theory he has made some good points, but I have significant doubts about taking his theories and finding in relation to Westpac's specific trading on a particular contravention date the requisite effect or likely effect that ASIC has contended for.
>
> ...
>
> [1843] In summary, **I did not find Professor Putnins' empirical analysis to be particularly useful on the question of effect or likely effect**. No doubt one's intuition is to readily assume that buying Prime Bank Bills pushes up prices and decreases yields (and BBSW), and selling Prime Bank Bills decreases prices and increases yields (and BBSW). But intuition cannot be easily applied to the complex dynamics of the Bank Bill Market as the above discussion should demonstrate.
>
> ...
>
> [1877] First, I do not consider Professor Putnins' theories, models or the application thereof to be sufficiently probative to draw conclusions concerning the effect on yields or BBSW of Westpac's trading in Bank Bills on the contravention dates. Certainly, his analysis does not establish actual effect. As to the question of likely effect, if "likely" means more probable than not, then his evidence in my view does not assist to show this ...
>
> (emphasis added)

[98] We hold in a dynamic balance the advice often attributed to Albert Einstein that "everything should be made as simple as possible, but not simpler." We refrain from making what is obviously a clear nexus between the announcement and the share price to be more complicated than what it is. We look at the spike in the share price after the announcement and the resumption of trading. We do not pretend to know the motivations that make up the human mind and heart, whether it be a combination of greed and risk-taking or that of long term investment based on fundamentals.

[99] Professor Putnin seemed focused on theorising whether investors would be influenced by the announcement after having read the CIMB April Research Report. That is venturing into the ephemeral and esoteric. To begin with, there is no empirical study on the extent of access to and availability of the CIMB April Research Report to the general investors and it would be quite presumptuous to conclude that a reasonable investor having studied the CIMB report would not be influenced by the announcement.

[100] Whilst there is a place for theorising, once the event has occurred, one must be prepared to accept reality and here, it is the reality of a 27% jump in the share price of Worldwide resuming trading at RM3.22 from the closing price prior to suspension of trading. As the learned judge rightly concludes at para. [170] of his GOJ:

> ... The empirical evidence was at odds with Professor Putnin's opinion.

[101] It is in that context that we prefer, as the learned judge did, the approach taken by SC's expert, Mr David Meow, in his "reduced form approach" as his basis for determining, materiality of the information and as we could not have summarised it better than the learned judge, we set out below his thought process:

> [162] To his credit, Mr Meow did undertake a "reduced form analysis" of the information contained in the announcement. He explained the reduced form approach in the following manner:
>
> **3.2.2 Reduced Form**
>
> As in most insider trading cases, the insider who learns from another may not possess the exact form as per the underlying public announcement but rather, in a reduced form. Thus, this report would need to conclude on materiality based on a reduced form approach.
>
> The reduced form approach would allow the opinion of this report to remain valid for any person possessing pieces of information which is subject to the announcement provided that the source remains reliable.

[163] However, in the reduced form analysis at para. 5.1.2 of his report, Mr Meow compared the "main narrative" of the announcement to the contents of the Star article. It has to be remembered that, at the time the defendant traded in the shares, Mr Barrock's article in the Star had not been published yet, and so the comparison between the contents of the announcement and the contents of the Star article was not relevant for the purposes of determining the materiality of the information that was in the possession of the defendant at the time he had traded in the Worldwide shares. In my view, the proper inquiry would have been to ask whether the information that Worldwide Holdings Berhad was to be taken private would have been information that a reasonable investor would expect to have a material effect on the price or value of Worldwide shares. The reduced form information here was the fact of the proposed privatisation by PKNS, without more.

[164] At trial, *the point on the materiality of the reduced form information regarding the proposed privatisation was eventually made by Mr Meow. In Mr Meow's opinion, if a reasonable investor found out about the privatisation, that investor could reasonably expect the offer price for the privatisation to be more than the current trading price, and that being the case, there would be room for the investor to accrue a profit from the purchase of Worldwide shares.*

...

[172] Having considered carefully the respective reports prepared by the experts and their testimony at trial, I was inclined to prefer the answer that Mr Meow had given at trial over the opinion of Professor Putnins.

(emphasis added)

[102] An appreciation of the strict requirement for a timeous and timely public announcement or disclosure by the listed company of any material information can be had by a general reading of para./r. 9 on "Continuing Disclosure" of the BLR. A suspension of trading is normally requested by a listed company to allow time for material information in the public announcement through Bursa-Link to be disseminated to the public to enhance market integrity, to promote market efficiency and to reduce information asymmetry. It is designed to prevent abuse of corporate information which is non-public and price-sensitive.

[103] Thus, in para/r. 9.03 of the BLR, it is provided as follows:

PART C - IMMEDIATE DISCLOSURE OF MATERIAL INFORMATION

9.03 Disclosure of material information

(1) A listed issuer **must make immediate public disclosure of any material information**, except as set out in paragraph 9.05 below.

(2) Information is considered material, **if it is reasonably expected to have a material effect on**:

A

(a) **the price, value or market activity of any of the listed issuer's securities**; or

(b) the decision of a holder of securities of the listed issuer or an investor in determining his choice of action.

B

(3) Without limiting the generality of subparagraph (2) above, material information may include information which -

(a) concerns the listed issuer's assets and liabilities, business, financial condition or prospects;

(b) relates to dealings with employees, suppliers, customers and others;

C

(c) relates to any event affecting the present or potential dilution of the rights or interests of the listed issuer's securities;

(d) **relates to any event materially affecting the size of the public holding of its securities**.

D

(emphasis added)

[104] It is a no-brainer that the information of a privatisation exercise would require the offer of Worldwide shares at a premium for otherwise there would be no incentive for the other non-PKNS' shareholders to dislodge their shares. With the eventual conclusion of the privatisation exercise the

E

size of the public holding of its securities would be practically nil.

[105] The test of knowledge that the information would have a material effect in the price or value of securities is an objective one as encapsulated in s. 89B of the SIA as follows:

F

89B Material effect on price or value of securities

For the purposes of this Division, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to such information which would or would tend to, on becoming generally available, **influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities**, or enter into an agreement with a view to acquire or dispose of such securities.

G

(emphasis added)

[106] Paragraph/r. 9.04 provides for "Examples of events which may require immediate disclosure" which includes (a) the entry into a joint

H

venture agreement or merger, (k) the making of a tender offer for another corporation's securities. It cannot be denied that the delisting exercise involved the entry into a JVA and the change of shareholding of the remainder non-PKNS' shareholders.

I

[107] The listed company under para./r. 9.07 of the BLR is required to monitor the market activity of its securities to see if there is unusual market activity, which may signify that a "leak" of the information may have occurred. Paragraph/r. 9.08 requires the listed company to rigorously comply with the need for timeous and timely as well as a thorough and truthful dissemination of material information consistent with the objective of Bursa to maintain integrity and transparency in an efficient market with no asymmetry of material information as follows:

PART D - THOROUGH PUBLIC DISSEMINATION

9.08 Thorough public dissemination

(1) *A listed issuer must release material information to the public in a manner designed to obtain its fullest possible public dissemination.*

(2) A listed issuer must ensure that no disclosure of material information is made on an individual or selective basis to analysts, shareholders, journalists or other persons unless such information has previously been fully disclosed and disseminated to the public. If material information is inadvertently disclosed at any meetings with analysts, shareholders, journalists or others, it must be publicly disseminated as promptly as possible.

(3) There may be limited circumstances where selective disclosure of material information is necessary, for example where the listed issuer is undertaking a corporate exercise or to facilitate a due diligence exercise. In such circumstances, the listed issuer must ensure that:

(a) the disclosure is restricted to only relevant persons;

(b) *the strictest confidentiality is maintained*; and

(c) the requirements in paragraph 9.07 are complied with.

(4) If the disclosure is made immediately before or during trading hours, the Exchange may impose a temporary halt or suspension in trading of the listed issuer's securities to facilitate dissemination and evaluation of the information released.

(5) *Any public disclosure of material information must be made by an announcement first to the Exchange* or simultaneously to the Exchange, the press and newswire services. For the avoidance of doubt, a listed issuer must not release any material information to the media even on an embargoed basis until it has given the information to the Exchange.

(emphasis added)

[108] Whilst it is true that in response to the "request for further and better particulars" on the information, which the SC said was not generally available price-sensitive information, the SC had also referred to the price at which the shares would be purchased, it is always open to the SC as the plaintiff to make concession through its witness and in this case, its expert witness Mr David Meow, that the price to be fixed would normally be fixed shortly before the public announcement of the privatisation exercise, taking into consideration the market sentiments then as reflected in the share price. Such a position does not derogate from the SC's case that the information not generally available and price-sensitive had come into the possession of the appellant when the appellant made two tranches of purchase of the impugned shares. It was the overwhelming material information on privatisation and not the route to be taken for the corporate exercise nor the exact price to be publicly announced that would be the crucial and critical material information as explained by Mr David Meow.

[109] That information on the proposed corporate exercise of privatisation that the appellant possessed, even absent the price, which no one would know until shortly before the public announcement, would be sufficient to constitute the offence of prohibited conduct of trading when the appellant purchased the impugned shares during the material period before the public announcement. In fact, the SC's expert, Mr David Meow, went on to explain in his examination-in-chief at CCB(2) Tab 39 at pp. 393 to 395 as follows:

> So, in my reduced form, anyone who possess the piece of information that is proposed privatisation which I also understand from Section 89 of SIA, information includes intention. *It includes proposal. It includes information not complete and hence it is my understanding that if the time of death is on the announcement date, any, that means the information will then be incomplete before the announcement date*. I wouldn't know what happens one day before the announcement. Maybe the letter wasn't signed. Maybe it was, it was not printed in what form. That would not be in my scope of work, ... Yes. The mode doesn't matter, the price doesn't matter because *if I know its privatisation, that would be the core of that material information. All others are supplementary to it*.
>
> (emphasis added)

[110] It is a case of the appellant being an insider in that he was in possession of not generally available price-sensitive insider information and that during the period of coming into possession of such information and before the public announcement, the appellant acquired shares in the company Worldwide to which the information relates.

[111] We find that the High Court had not erred or mis-appreciated the evidence before it in concluding that the not generally available information was such that a reasonable person would expect it to have a material effect on the price or the value of securities of Worldwide.

Whether The SC Had Proved "Improper Use" Of The Not Generally Available Price-sensitive Information In The Purchase Of The Impugned Shares When The Appellant Said He Had Purchased The Shares Based On The CIMB April Research Report Where The Shares Were Clearly Undervalued And That There Would Be An Expected Dividend Declared

[112] It was vigorously argued that the offence of "insider trading" is not proved if it is not shown how the alleged offender has made "improper use of such unpublished price-sensitive insider information" without which there is no *mens rea* for the offence. With respect, *mens rea* for an offence is not to be conflated with the rationale for the offence. An offence is constituted if the elements of the offence as defined have been proved.

[113] Perhaps learned counsel for the appellant was influenced by the original definition of the offence of "insider trading" where under the SIA that came into force on 7 July 1983, s. 90 thereof which provided for the offence had stated the prohibition against the insider to be that he "shall not make improper use of such information to gain, directly or indirectly, an advantage for himself or for any other person and any person who contravenes or fails to comply with the provisions of this section commits an offence."

[114] A seismic change had taken place where the offence of "insider trading" had been redefined to now consist of two main ingredients *ie*, an insider being in possession of not generally available price-sensitive information and during that material period had made a acquisition or disposal of shares in the company, the subject of the information. Very significantly, the element of having to prove "improper use of such information" had been deleted. In other words, if one is present (being possessed of the information) and the other is done (acquire or purchase securities), then an offence of insider trading would have been committed.

[115] The amendment was introduced by the Securities Industry (Amendment) Act 1998 (Act A1017) wherein new provisions in ss. 89A, 89B, 89C, 89D, 89E, 89F, 89G, 89H, 89I, 89J, 89K, 89L, 89M, 89N and 89O were introduced which came into force on 1 April 1998. The old s. 90 of the SIA was repealed and in its place was substituted the above provisions. Section 90 was then redrafted to provide for "Civil Remedies."

[116] We had learned and indeed drawn inspiration from the Australian Corporation Act and our s. 89E of the SIA bore great resemblance to s. 1002G of the Australian Corporations Act which s. 1002G(1) reads as follows:

> Subject to this Division, where:
>
> (a) a person possesses information that is not generally available but, if it the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and

A (b) the person knows, or ought reasonably to know, that:

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities;

B the following subsections apply.

[117] The High Court of Australia in *Mansfield v. The Queen; Kizon v. The Queen* [2012] HCA 49, in an appeal from the decision of the Supreme Court of Western Australia, observed as follows in tracing the metamorphosis of the relevant provision:

C 18. Sub-section (2) of s. 1002G relevantly provided that *the insider must not (whether as principal or agent) buy or sell, or procure another to buy or sell, the securities*. Sub-section (3) relevantly provided that the insider must not, directly or indirectly, communicate the information or cause it to be communicated to another, if the insider knows or ought reasonably to D know that the other person would be likely to buy or sell or procure another to buy or sell the securities.

…

22. Although the offence created by s. 1002G may sometimes be referred to as an offence of "insider trading", it is more accurately described, in E the words of the heading to the section, as "*Prohibited conduct by [a] person in possession of inside information*" (emphasis added). *That is, s. 1002G prohibited persons in possession of information of a certain character from trading in shares*. The relevant character of the information was that it "is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price F or value of securities" of the relevant body corporate. And by operation of s. 1002C, "a reasonable person would be taken to expect information to have a material effect on the price or value of securities of a body corporate if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not" to trade in those securities. Noticeably absent from these provisions was G any requirement that the information in question come from within the corporation the securities of which were the subject of the prohibition.

…

24. The general scheme of the new insider trading prohibitions did not H differ in any presently relevant way from the provisions it replaced. *The new s. 1043A prohibits a person who possesses information that the person knows, or reasonably to know, is not generally available and that, if it were, a reasonable person would expect it to have a material effect on the price or value of particular securities (or certain other identified financial products) from trading in securities or procuring another to do so*. As in the earlier form of the prohibition, I "information" is defined" as including "matters of supposition", "other matters that are insufficiently definite to warrant being made known to the public" and "matters relating to the intentions, or likely intentions, of

a person". Section 1042D identifies when a reasonable person would take information to have a material effect on price or value.

(emphasis added)

[118] The learned authors of *Securities and Financial Services Law*, 9th edn, by Robert Baxt, Ashley Black and Pamela Hanrahaw, could not have commented more clearly with respect to the Australian insider trading provisions, as follows:

> 17.12 The prohibition in section 1043A is triggered by the mere possession of such information, rather than focusing on the 'use' of the information. *The insider trading prohibition applies where a person possesses inside information, and is not concerned with whether that person uses that information in making a trading decision. In other words, a person is prohibited from dealing in a Div 3 financial products while he or she possesses non-public price-sensitive information in respect of that product, even if he or she would have traded irrespective of the information or is trading for a hedging purpose rather than a profit making purpose.*
>
> (emphasis added)

[119] By no means does that redefinition convert the offence into a strict liability offence. *Mens rea* is still the required ingredients in the element of "being in possession of not generally available price-sensitive information" and that of "acquire or dispose of securities". Thus, with respect to "possession of information that is not generally available" the SC still has to prove that the insider under s. 89E(1)(b) of the SIA "knows or ought reasonably to know that the information is not generally available."

[120] Likewise, with respect to the "price-sensitive" nature of the information, the SC needs to prove that the information on "becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities." Therefore, "knowledge" of both the fact of the information being "not generally available" and its "price-sensitive" nature would have to be proved either by direct evidence or circumstantial evidence *via* deduction, inference or conclusion from available facts.

[121] Then, there is the essential element of "acquire or dispose of securities", which may be done either by way of a self-made act or a specific instruction to one's agent or a standing instruction, all of which require *mens rea*. If someone has unlawfully used or hijacked the trading account of the insider, that could not be said to be the act of the insider, and hence, the *mens rea* element is absent.

[122] We shall now place the original s. 90 side by side the new s. 89E to show the significant changes in the definition of the offence of insider trading as shown below with the italicised print for emphasis:

Section 90 Prohibition on abuse of information obtained in official capacity	*89E Prohibited conduct of person in possession of inside information*
Any person, who is or in relation to dealing in securities of a corporation, *has any information which if generally known might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange* and which:	(1) A person is an 'insider' if that person:
	(a) *possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities;* and
(a) he holds by virtue of hs official capacity or former official capacity;	(b) *knows or ought reasonably to know that the information is not generally available.*
(b) it would be reasonable to expect a person in his official capacity or former official capacity not to disclose except for the proper performance of the functions attaching to that official capacity; and	(2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates:
(c) he *knows he is unpublished price-sensitive information* in relation to securities of the corporation, *shall not make improper use of such information to gain, directly or indirectly, an advantage for himself or for any other person* and any person who contravenes or fails to comply with the provisions of this section commits and offence.	(a) *acquire or dispose of*, or enter into an agreement for or with a view to the acquisition or disposal of *such securities*; or
	(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.
	(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to:
	(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or
	(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.
	(4) A person who contravenes or fails to comply with subsection (2) or (3) commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.
	(5) The Minister may prescribe, and make regulations in respect of, persons, or transactions relating to securities, or any particular class, category or description of persons, or any particular class, category or description of transactions relating to securities, to whom or which this section does not apply.
	(emphasis added)

[123] The mischief that the amendment sought to overcome was more than plain and obvious. It was to do away with the requirement to prove "improper use of the information." The Legislature could have used the device of an "irrebuttable presumption" or "deeming" provision but in this case the same effect could be efficiently had in terms of proving the elements of the offence by the device of redefining it by taking away the need to show or prove "improper use of information."

[124] Indeed, the short title to the old s. 90 "Prohibition on abuse of information obtained in official capacity" has now been substituted for the new short title to the new s. 89E as "Prohibited conduct of person in possession of inside information." The sting has shifted from an "abuse of information" to that of "prohibited conduct" with respect to the same person in possession of the inside information.

[125] When Parliament redefined the offence of insider trading and took away the ingredient of "improper use of information", it means that that ingredient no longer needs to be proved as that ingredient is not a necessary element to constitute the offence. It is when the ingredient of an insider being in possession of information not generally available and price-sensitive in nature and that of an acquisition or disposal of securities is made during the relevant period before the information becomes generally available, that the offence of insider trading or prohibited conduct is committed.

[126] In another Supreme Court's case from Western Australia in *R v. Farris* [2015] WASC 251, the Supreme Court of Western Australia laid down clear principles that the mental element for insider trading prohibitions do not require proof that the offender consciously traded using the inside information when it observed as follows:

> The effect of s. 1043A is to create a class of persons who by reason of their possession of Inside Information are prohibited from trading: *Mansfield v. R* [2012] 247 CLR 86; 293 ALR 1; 91 ACSR 1; [2012] HCA 49. *If a person possesses information, that he knows is not generally available and is price sensitive, the prohibition on trading will apply whether or not he consciously brings to mind that information and its nature at the time he makes a decision to trade in shares*. The reason for the alternative between 'knows' and 'ought to know' is not to deal with lapses of memory or a failure to recall the true nature of the information possessed but to *deal with the situation where a person possesses Inside Information and fails to appreciate that it is not generally available or price sensitive where the objectively available circumstances should have led them to that conclusion*.
>
> (emphasis added)

[127] Information not generally available which is price-sensitive would become generally available when a public announcement is made through the Bursa-Link. Everyone and anyone who is keen on investing in any of such companies listed with the local exchange would have access to the

information through the Bursa webpage and the listed company's webpage as well as the business pages of the news media publication that would probably carry the news.

[128] Thus, from a market integrity perspective, there is a fair and orderly market that contributes to market efficiency with little asymmetry of material information. Material information not released to the investing public would lead to market inefficiency as prices of securities may not then be reflective of reality.

[129] We are familiar with how, in our contexts, a rumour is generally regarded as having some circles of truth around it and when there is much speculation in the securities with erratic price increase or decrease, generally Bursa would ask the listed company to explain if it is aware of some things brewing that may have caused the unusual share price spike or dive. Some listed companies may, knowing something is brewing and realising too that the material information could no longer be kept under wraps, ask for their securities to be suspended and then make a public announcement of what is happening.

[130] Proving "improper use" of such information is no longer necessary as anyone caught for and charged with insider trading would invariably say that they traded based on what sources of information lawfully made available to them as in some analysts or research reports that were given to them or that they have access to as a client of some investment banks in which they have a share trading account or even on their own analysis of listed companies' annual report and quarterly reports.

[131] The appellant had stated that he bought the shares based on the CIMB April Research Report and that there would be dividends to be declared soon. It is not necessary for the court to determine which is the trigger or predominant factor in the decision to purchase the shares. The prohibition is against the purchase of the shares when one is in possession of not generally available price-sensitive insider information. In *R v. Rivkin* [2003] NSWSC 447, it was held that:

> 24. Secondly, in relation to the price sensitivity of the information, it was, as I have suggested, no mere coincidence that the shares were bought on 24 April 2001. It is true that Mr Kerstens rang Mr Rivkin and during the course of the conversation remarked that there had been a lot of activity in Qantas and that "they looked interesting". *It is of course, not necessary for the Crown to prove, as an essential element of the offence, that Mr Rivkin procured the purchase of the Qantas shares because of his possession of the insider information*.
>
> (emphasis added)

[132] Even in the context of the United States, there has been a paradigm shift towards a prohibited conduct test than finding a causal connection between the use or misuse of the information and the purchase of the shares. It was held in the United States Court of Appeal case of *United States v. Teicher* 987 F2d 112, as follows:

> ... When the fiduciary is an insider who is not in a position to make a public announcement, the fiduciary must abstain. It would be consistent with the "disclose or abstain" rule that a tippee acquire the same duty as his fiduciary tipper.
>
> *Finally, a "knowing possession" standard has the attribute of simplicity. It recognizes that one who trades while knowingly possessing material inside information has an informational advantage over other traders. Because the advantage is in the form of information, it exists in the mind of the trader. Unlike a loaded weapon which may stand ready but unused, material information cannot lay idle in the human brain. The individual with such information may decide to trade upon that information, to alter a previously decided-upon transaction, to continue with a previously planned transaction even though publicly available information would now suggest otherwise, or simply to do nothing*. In our increasingly sophisticated securities markets, where subtle shifts in strategy can produce dramatic results, it would be a mistake to think of such decisions as merely binary choices – to buy or to sell.
>
> As a matter of policy then, *a requirement of a causal connection between the information and the trade could frustrate attempts to distinguish between legitimate trades and those conducted in connection with inside information*. See 7 *L. Loss & J. Seligman, Securities Regulation 3505* (3d ed. 1991) ("The very difficulty of establishing actual use of inside information points to possession as the test.").
>
> In any event, we need only rule with respect to the case before [**26] us. Viewing the jury charge in its entirety and based upon the record, we find that it is unnecessary to determine whether proof of securities fraud requires a causal connection, because any alleged defect in the instruction was harmless beyond doubt.
>
> (emphasis added)

[133] In the field of "knowledge", it is impossible to "drill into" and "detect" as it were the element of the knowledge that was used when trading in securities during the material prohibited period as no one knows what goes on in the mind of a person purchasing or disposing of shares in a listed company. Thus, "improper use" has to be by reference to deduction, inference and conclusion from the circumstantial evidence in each particular case.

[134] Parliament may use the device of "presumptions" and "deeming" with respect to proving "improper use" or amend the law on the ingredients of insider trading to focus on what is prohibited, which is the prohibition of dealing in securities by an insider who knows or ought reasonably to know of generally not available price-sensitive information during the relevant period.

[135] We see such an approach to prescribing offence in, for instance, the prohibition against directors and principal officers of a listed company or issuer dealing with shares in a listed company a month before the announcement of its quarterly results during what is referred to in the BLR as the "closed period." Paragraph/rule 14 of the BLR defined a "closed period" to mean a period commencing 30 calendar days before the targeted date of announcement up to the date of the announcement of the following to the exchange – (i) in relation to a listed issuer, its quarterly reports; or (ii) in relation to a listed collective investment scheme or listed business trust, the quarterly reports or annual reports of the listed collective investment scheme or listed business trust, as the case may be.

[136] It is provided in "Part D-Restrictions" in para./r. 14.04 as follows:

> Prohibition on dealings when in possession of price-sensitive information
>
> An affected person must not deal in the listed issued securities of his own listed issued or of other listed issuers as long as he is in possession of price-sensitive information relating to such listed securities.

[137] Likewise too under the then Companies Act 1965 in ss. 69D, 69E, 69F, 69G, 69H, 69I, any acquisition or disposal of shares in a listed company by a substantial shareholder holding not less than 5% of the nominal amount of the voting shares in the company has to be notified to the company for the relevant announcement to be made to Bursa so that no one is taken by surprise with any action of substantial shareholders in listed companies. See similar provisions in ss. 136 to 141 of the Companies Act 2016.

[138] All these myriad restrictions have been put in place by the BLR and the Companies Act 1965 and now the Companies Act 2016 and the CMSA so as to enhance the integrity and efficiency of the capital market to ensure a fair and transparent market.

[139] With the amendment deleting the need to prove "improper use", an insider cannot now say that whilst he knew about the analyst or research report first recommending "BUY" because of its shares being under-valued and that a dividend would be declared soon and that later he happened to be engaged as a lawyer to advise and structure the privatisation deal involving the same listed company; that he was nevertheless still resolute in not allowing the second byte of knowledge gained as an insider from influencing his purchase in this case of securities in the listed company.

[140] There is no China Wall that one can erect within one's brain and say that one's action as an investor in purchasing the shares here was influenced solely by knowledge gained from one's study of the CIMB April Research Report in question and not at all by the generally not available price-sensitive insider information that one is now aware of as an insider in one's capacity as the professional adviser to the privatisation deal.

[141] It is only too obvious that one cannot erase and expunge from one's memory the material insider information that one has been fed with and to say that one's decision in purchasing the first tranche and then a second tranche of shares in the listed company was not influenced at all by the said material insider information gained as an insider would be artificial.

[142] Learned counsel for the appellant tried to convince us to follow the route taken in *PP v. Ng Chee Kheong* [1999] SGHC 204, where Yong CJ sitting in the High Court held:

> In my view the *mens rea* required for an offence of insider trading under section 103 is **an intention to use the undisclosed information knowing that the information was price-sensitive and unavailable to the public**. However, the test to be applied as to whether an accused person possessed such knowledge at the time he made the trade is an objective test. The respondents, reasons for making the trade must be tested objectively.
>
> (emphasis added)

[143] Singapore Parliament sprang into action to specifically legislate that intent to use insider information was not a necessary ingredient for the offence of insider trading. This was acknowledged by the Singapore Court of Appeal case of *Lew Chee Fai Kevin v. Monetary Authority Of Singapore* [2012] SGCA 12 when it observed as follows:

> Our parliament has made it clear that s. 220 was enacted to legislatively overrule the decision in *PP v. Ng Chee Keong* [1999] 2 SLR (R) 1176, which required proof of an "intent to use" the inside information for insider trading (see Singapore Parliamentary Debates (5 October 2001) at cols 2137 and 2138). There is therefore no longer any requirement of proving the *mens rea* to use inside information in order to prove a contravention of either sections 218 or section 219 of the SFA.

[144] Thus s. 220 of the Securities and Futures Act of Singapore reads:

> **Not necessary to prove intention to use**
>
> 220. (1) For the avoidance of doubt, in any proceedings against a person for a contravention of section 218 or 219, **it is not necessary for the prosecution or plaintiff to prove that the accused person or defendant intended to use the information** referred to in section 218(1)(a) or (1A)(a) or 219(1)(a) in contravention of section 218 or 219, as the case may be.
>
> (emphasis added)

[145] We do not have the baggage associated with a decision like the Singapore case of *PP v. Ng Chee Kheong* (*supra*) and so we do not have to get our Parliament to legislatively overrule such a decision. Our position is more consistent with the Australian approach and interpretation as our insider trading provisions are very similar to the Australian Corporations Act provisions.

[146] Even assuming for a moment that "improper use" of the material information is an ingredient to be proved, the SC had proved this with the reasonable deduction, inference and conclusion derived from the actions of the appellant in the following:

(i) instructing his associate to research into the Selangor State Development Corporation Enactment;

(ii) writing the name of Worldwide in the first draft of the relevant documents prepared for the exercise;

(iii) purchasing the first tranche of Worldwide shares before leaving for London;

(iv) purchasing a second tranche of Worldwide shares;

(v) non-denial that he had acquired the shares of Worldwide during the material period upon a fortuitous discovery by CIMB from the list of shareholders of Worldwide;

(vi) disposal of the impugned shares after resumption of trading after the announcement.

[147] It would be recalled in evidence that there was a meeting soon after the announcement when Mr Tan and Mr Ong confronted the appellant on their fortuitous discovery that the appellant had purchased 600,000 shares in Worldwide not long before the announcement when he had access to the insider information conveyed to him by them and that such an action would be highly inappropriate, not to mention its criminality. The discovery had been stumbled upon because a shareholder had applied to court for an injunction to stop the deal and Mr Tan and Mr Ong had looked into the list of shareholders of Worldwide with a view to knowing the percentage of shareholding of the applicant shareholder.

[148] The appellant's explanation was that he had purchased them some time ago and since it is a problem with CIMB, he would take steps to dispose of it. However, his attempted disposal was made soon after the resumption of trading of Worldwide shares, which would support the SC's assertion that the appellant had instructed his remisier much earlier to so dispose of the impugned shares upon resumption of trading and to realise his gain.

[149] The High Court was right in carefully considering every relevant piece of evidence to finally conclude on the balance of probabilities that the appellant was in possession of the not generally available price-sensitive insider information and that he purchased the impugned shares before the information of the privatisation of Worldwide by PKNS was made public whether *via* the Star business news or the Bursa announcement and that as such the offence in respect of the contravention of s. 89E(2) of the SIA had been proved for the purpose of a civil action in disgorgement of the gain under s. 90(1) of the SIA for the remedies under s. 90A(5).

Whether The Reliefs Granted By The High Court Was Reasonable Having Regard To All Relevant Circumstances In The Commission Of The Offence

[150] More is expected of an investment banker and its professional advisers who are themselves the source of the prohibited insider information or nearer to its source who should zealously guard against any trading of securities in the company to which the information relates during the prohibited period when the insider information remains not generally available and a reasonable person would expect it to be price-sensitive in nature.

[151] Market integrity assumes a level playing field for all investors and any professional involved in the corporate deal or exercise is a key player in ensuring that. The playing field would be pathetically uneven when those with access to such insider information engage in share trading, be it buying or selling either by themselves or through their agents. Knowledge is power and more so the preserved and protected knowledge of a few by a few and with great power comes great responsibility. A professional like the appellant must resist every temptation to trade in the securities of the company to which the information relates.

[152] Confidence in the fairness and integrity of the securities markets would be severely compromised if professionals like the appellant specifically appointed to advise on the corporate exercise secured an unfair advantage over the rest in making a gain, in this case, through the purchase of the impugned shares and later to quickly dispose of it upon resumption of trading. Such a prohibited conduct committed by a professional lawyer directly involved in the corporate exercise undermines the securities markets and brings the profession into disrepute.

[153] Much trust is reposed on professionals like lawyers engaged in many a corporate exercise. It does not matter if walls have ears, but those in the know are held to a higher standard, and trust, once broken, is difficult to be restored.

[154] The disgorgement of an amount equal to three times the gains made is provided for under s. 90A(5)(a) of the SIA and it kicks in upon a finding that a contravention of s. 89E(2) had taken place. For all the above reasons, we do not think that the award of the maximum civil penalty of RM1 million is misplaced but on the contrary, much needed to send a clear message that indulging in the prohibited conduct is painful. After all, a professional like the appellant stood in a fiduciary relationship with his client, redolent of the trust and confidence reposed in him.

[155] Complex as the human mind may be, we all move in the direction of our dominant thought and any thought to trade in the securities during the prohibited period must be nipped in the bud. While we cannot prevent the birds from flying over our head, we must ensure that they do not build their nests there.

[156] For the same reasons, we see no good reason to interfere with the order of the High Court barring the appellant from becoming a director of any public-listed company for a period of ten years pursuant to s. 100(1)(kk) of the SIA.

[157] The appeal of the appellant is without merits and so we dismissed it with costs of RM50,000 to the SC, the respondent in this appeal.